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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CASSANDRA DIAZ, JUAN R. PEREZ AND ANTONIO DIAZ, BY THEIR MOTHER AND NATURAL GUARDIAN, ANGELINA PEREZ,

Petitioners,

—vs.—

THE CITY OF NEW YORK AND THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Cassandra Diaz, a minor, is still in a vegetative state. Though her brother Juan Perez awoke from his coma, he is permanently brain damaged. Cassandra's mother Angelina Perez, who is valiantly caring for her daughter at home, faces the prospect of putting Cassandra into an institution due to a probable cut off of state home care funds. Petitioners cannot seek compensation from those who harmed them. They have been deprived of their day in court and their rights to due process and equal protection of the law under the federal Constitution and 42 U.S.C. Sec. 1983.

QUESTIONS PRESENTED

1. Whether the disabled, infant petitioners (one of whom is still in a coma) were denied their day in court, due process, and equal protection of the law under the federal Constitution and 42 U.S.C. § 1983 where: (a) the lower court, without notice, retroactively rescinded its prior order granting petitioners leave to refile a late notice of claim application (the first application having been denied on the technicality that a notice motion rather than order to show cause had been used and the denial having been without prejudice), (b) the mother of the petitioners was unable to protect the rights of her disabled infants due to her sudden homelessness (due to fire) and mental illness, (c) the courts refused to apply state statutes and precedents that provided tolls for infancy and disability, (d) the courts "presumed" that respondents had been prejudiced in this case although litigants involved in prior (and subsequent) cases were recognized to have a due process right to a hearing on the issue of prejudice and in other cases the courts held that prejudice cannot be presumed, (e) the social services agency, a department of the City of New York, within the notice of claim time period, was aware of the mother's incompetence, sought to gain custody of the infants and did not file a notice of claim although social services was acting *in loco parentis* to the infants, and (f) the failure of the city agency (acting *in loco parentis* to the infants) to file the timely notice of claim with the city constituted a conflict of interest?

2. Whether the disabled, infant petitioners were wrongfully denied their day in court, due process, and equal protection of the law under the federal Constitution and 42 U.S.C. § 1983 because the state courts, without discussion or comment, applied standards to the case at bar which contravened state statute and/or were inconsistent with those utilized in the other Appellate Divisions and the Court of Appeals of New York in determining whether to grant leave to file a late

notice of claim and in whether to consider the motions as ones for renewal?

3. Whether the disabled, infant petitioners were wrongfully denied due process, and equal protection of the law, under the federal Constitution, because the Court of Appeals of New York improperly dismissed petitioners' motion for leave to appeal upon the ground that "the order does not finally determine the proceeding within the meaning of the Constitution" when it is clear that the state supreme court order being appealed was a final disposition of the case with prejudice?

4. Whether constitutional due process and 42 U.S.C. § 1983 are violated when a state court grants permission to file an application, does not place a time limit on filing and then suddenly, without notice or warning, rescinds the permission?

LIST OF PARTIES

The caption contains the names of all parties who appeared in the proceeding in the court whose judgment is sought to be reviewed.

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The decision and order of the New York State Supreme Court, Appellate Division, Second Department, is officially reported as *In the Matter of Cassandra Diaz et al. v. City of New York, et al.*, 211 A.D.2d 789, 622 N.Y.S.2d 102 (2nd Dept. 1995) and was issued and entered on January 30, 1995. It appears in App. 1a-3a. The petitioner's motion for reargument, or, in the alternative, for leave to appeal to the New York State Court of Appeals, pursuant to N.Y. Civ. Prac. L. & R. 5602(a)(1)(i), was denied by the Appellate Division in an order dated and entered April 10, 1995 and served with notice of entry on April 28, 1995. A copy of this order, which is not officially reported, appears in App. 9a-12a.

The underlying proceeding was commenced by petitioners' former counsel on or about February 29, 1988 by service of a Notice of Motion to file a late Notice of Claim against respondents. The unreported decision and order of the New York State Supreme Court, Kings County, that denied the motion "without prejudice to another application brought on by notice of petition", was issued on April 11, 1988 and is reproduced in App. 17a. The unreported decision and order of the New York State Supreme Court, Kings County, that denied petitioners' motion by Order to Show Cause, was issued on October 18, 1991 and is reproduced in App. 6a-8a. The unreported order of the New York State Supreme Court, Kings County, that denied the petitioners' motion to renew and reargue was issued on September 2, 1993 and is reproduced in App. 4a-5a.

JURISDICTION

The petitioners' motion directly to the Court of Appeals for discretionary review (leave to appeal) pursuant to N.Y. Civ. Prac. L. & R. 5514 and 5602(a)(1)(i) was dismissed and otherwise denied by the Court of Appeals of New York on September 7, 1995. The denial is officially reported at 86

N.Y.2d 808, 632 N.Y.S.2d 494, 656 N.E.2d 592 (1995) and is reproduced in App. 13a-15a. The petitioners' motion pursuant to N.Y. Civ. Prac. L. & R. 2221 and 22 NYCRR 500.11(g) for reargument of the motion for leave to appeal to the Court of Appeals was denied on December 28, 1995. The denial, which is not officially reported but appears on LEXIS at 1995 N.Y. LEXIS 5033, is reproduced at App. 16a.

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of the date of denial of the motion for reargument of the motion for discretionary review (leave to appeal) to the Court of Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) (1995) because the decision and order of the Appellate Division sought to be reviewed raises questions of denial of petitioner's rights to a fair trial, due process, and equal protection of the law under the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law. . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The civil rights statute 42 U.S.C. Sec. 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The tragic injuries suffered by the disabled, infant petitioners because of the respondents' negligence in responding to a devastating fire are compounded by the bitter irony that they are being unfairly punished by the judicial system and denied their day in court and their rights to due process and equal protection of the law, as well as their civil rights, solely because their former counsel commenced this action in 1988 by way of notice motion (which included the proposed notice of claim) rather than by way of order to show cause.

The important issues raised by this case are whether the state courts of New York should be permitted to arbitrarily and summarily deny disabled, infant petitioners leave to file a late notice of claim, thereby depriving petitioners of their day in court and their rights to due process and equal protection of the laws, by ignoring principles of *stare decisis*, violating the separation of powers doctrine, and by, *inter alia*: a) illegally and retroactively rescinding a prior order granting petitioners' leave to refile "without prejudice" and denying petitioners' proper order to show cause; b) using criteria in considering the petitioners' applications for leave to file a late notice of claim that were more stringent than those required by New York state statute and those used in their own well-established and binding precedents; c) refusing to apply the tolls for infancy, disability and insanity as provided by New

York state statute and as set forth in long-standing precedent when they knew that the petitioners were disabled infants and that the mother was unable to protect the rights of her disabled children due to her own disabilities; d) failing to adhere to their own binding precedents and state law that prejudice is not to be presumed; e) breaching their equitable duty *in locus parentis* to protect the disabled, infant petitioners' legal interests when the state itself was trying to remove the children from their mother; and f) improperly classifying and treating the petitioners' motion to renew as one to reargue so that it would be considered nonappealable.

Another significant issue that is posed by this case is whether the disabled, infant petitioners were wrongfully denied due process, and equal protection of the law, under the federal and New York State Constitutions, as well as their civil rights under 42 U.S.C. § 1983, because the Court of Appeals of New York improperly dismissed petitioners' motion for leave to appeal upon the ground that "the order does not finally determine the proceeding within the meaning of the Constitution" when it is clear that the state supreme court order being appealed was a final disposition of the case with prejudice that conclusively deprived the petitioners from ever having the opportunity to have their claims heard on the merits in a court of law. The actions of the state courts have violated the separation of powers doctrine and have deprived the petitioners of their federal constitutional rights to due process and equal protection.[1]

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[1] The petitioners raised the issues of the denial of their federal constitutional rights, including their rights to their day in court, due process, and equal protection of the law at pp. 1 and 6 of their October 24, 1994 reply brief; at p. 19 para. 63 and p. 29 para. 87 of their February 28, 1995 motion to the Appellate Division for reargument or in the alternative for leave to appeal to the Court of Appeals; at p. 9 para. 20 of their March 22, 1995 reply affirmation of Robert G. Spevack in support of petitioners' motion to reargue or in the alternative for leave to appeal to the Court of Appeals; at pp. 15 and 33 of their Mary 8, 1995 motion for leave to appeal to the Court of Appeals; and at pp. 3, 10, 26, 28 and 32 of their October 3, 1995 motion for reargument to the Court of Appeals.

A. Background

Petitioner Cassandra Diaz, who was fourteen years of age on November 7, 1995, suffered from severe brain anoxia secondary to severe smoke inhalation, cardio-respiratory arrest, and carbon monoxide poisoning as a direct result of the respondents' negligent actions following the December 12, 1986 fire. From the time of the fire to the present, she has been in an irreversible coma in a persistent vegetative state. As her medical records indicate, Cassandra is profoundly mentally retarded and will remain that way for the rest of her life.

Her brother, Petitioner Juan Perez, who was eleven years old at the time, suffered cardiac arrest and also sustained carbon monoxide poisoning; he was in a coma for five days after the incident. He has suffered cognitive, memory and motor slowing. The prognosis for his recovery and future achievement is poor. Petitioner Antonio Diaz, who was two years of age at the time of the fire, suffered smoke inhalation and blood poisoning.

The mother and natural guardian of the infant Petitioners, Angelina Perez, herself suffered devastating physical, emotional, and psychological injuries. During the winter of 1986-87, she was homeless and lived on the street and slept in subway stations. She experienced bouts of mental illness and reactive psychosis. Her medical records indicate that she was suffering from extreme emotional distress and periods of hysterical blindness which persisted for approximately two years after the catastrophic fire.

Indeed, Angelina Perez' mental illness was so serious that the social welfare authorities instituted civil proceedings to remove her children from her custody. The proceedings continued for over a period of two years. Against all odds, Ms. Perez has prevailed over many of the adversities that besieged her and has received publicity for her fortitude in caring for her brain-injured daughter Cassandra. With the aid of com-

munity contributions and volunteers, she has removed Cassandra from New York City to Syracuse, New York, where the family now resides.

B. Prior Proceedings

The underlying proceeding was commenced by petitioners' former counsel on or about February 29, 1988 by service of a Notice of Motion to file a late Notice of Claim against the respondents. The motion alleged, *inter alia*, that: 1) the petitioners' delay in filing a claim was justified because the infant petitioners and their mother Angelina Perez sustained severe and disabling injuries as a result of the devastating fire and because Ms. Perez was more immediately concerned with seeking medical care and treatment for her children than in pursuing her legal remedies; 2) the application was timely in that it was made well within the statutory limit of 1 year and ninety days after the date of the occurrence; 3) the petitioners' action was meritorious due to the failure of the New York City Fire Department (hereinafter "NYCFD") to act in a reasonable manner with regard to the removal and resuscitation of the infant petitioners Cassandra Diaz and Juan Perez,[2] as well as Ms. Perez and her other children, from the subject apartment and the failure of the New York City Health and Hospitals Corporation (Emergency Medical Services) (hereinafter "NYCHHC" or "EMS") to timely respond and provide emergency medical treatment at the scene; 4) by responding to the fire, the respondents had assumed a special duty to the petitioners; and 5) the respondents would not be prejudiced by granting the application because, by virtue of their presence at the scene of the fire and the reports and records that were prepared, they had actual notice of the facts and circumstances underlying petitioners' claims.

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[2] The respondents failed to resuscitate Cassandra Diaz and failed to properly remove Juan Perez from the apartment, resulting in his striking his head.

In an Order dated April 11, 1988, the Supreme Court, Kings County, denied petitioners' motion on technical grounds "without prejudice to another application brought on by proper service", in that the action had to be commenced by way of Order To Show Cause, not by ordinary notice motion. (App. 17a)

A proper motion by way of an Order To Show Cause was brought on September 26, 1991 by petitioners' present counsel by which they sought an Order granting leave to file a late Notice of Claim. The supporting affirmation of petitioners' counsel reasserted the grounds set forth in the prior application and further alleged that petitioners' application was timely pursuant to the New York Civ. Prac. L. & R. 208, which tolled the statute of limitations and the time within which to file an application for a late Notice of Claim during the infant petitioners' minority.

The New York State Supreme Court, Kings County, denied petitioners' motion by Order dated and entered October 18, 1991. (App. 6a-8a) The Court reasoned that "a delay of five years must, of necessity, result in prejudice"; "[t]he legislature has concluded that after three years (absent tolling provisions) this kind of action should be over; and "there is no showing that the respondents had knowledge of any of the facts underlying this claim." The Court did not directly address several of petitioners' key arguments, i.e. that, *inter alia*, the application was timely because it was made well within the statutory limit of 1 year and ninety days after the date of the occurrence and because the New York Civ. Prac. L. & R. 208 tolled the statute of limitations and the time within which to file an application for a late Notice of Claim during the infant petitioners' minority.

A Notice of Appeal to the Appellate Division, Second Department, was filed, and the appeal was subsequently consolidated with the appeal from the September 17, 1993 Order.

Petitioners' counsel then served a motion to Renew and Reargue dated June 1, 1993. They presented new material evidence demonstrating the merits of the petitioners' claims and the nature and extent of the petitioners' injuries and disabilities. This new material evidence included: 1) the report from Dr. Joel Redfield, who examined and tested Juan Perez and who concluded that Juan has abnormal brain functioning and diminished intellectual capacity directly as a result of the blunt head trauma incurred when respondents dropped him, causing him to fall and strike his head on the ground; 2) an affidavit from Nadean Rothbart, who was present at the scene and observed the injury to both Cassandra Diaz and Juan Perez and who confirmed that the respondents failed to provide any resuscitation whatsoever and denied family members an opportunity to perform CPR; 3) a copy of the discharge summary from Cassandra Diaz' stay at the Alfred Dupont Institute which indicates that Cassandra is in a vegetative state with a tracheotomy tube as well as a gastrostomy tube and has a diagnosis of hypoxic encephalopathy, respiratory failure, seizure disorder, and other catastrophic injuries; 4) the records from the Syracuse Special Education Department confirming that Cassandra is profoundly mentally retarded and orthopedically impaired as a result of the anoxia she sustained in the fire in question; 4) photographs of Cassandra Diaz showing her vegetative condition; 5) an affidavit from Dr. Redfield chronicling the injuries sustained by Angelina Perez; 6) copies of several newspaper articles praising Ms. Perez for her courage and fortitude in caring for Cassandra; and 7) a copy of the NYCFD "structural fire" report regarding the incident in question.

In his supporting affirmation, petitioners' counsel reasserted the grounds of the prior applications for leave to file a late notice of claim and pointed out, *inter alia*, that Ms. Perez suffered severe physical and psychological injuries as a result of the fire that effectively deprived her of the ability to pursue her children's legal remedies. As a result of the

stress created by her dire situation, Ms. Perez developed episodes of mental illness and reactive psychosis which produced periods of hysterical blindness for approximately two years. She became disoriented, fell into a state of extreme emotional distress, and remained homeless during the winter of 1986 through 1987. Indeed, because of her mental illness, Ms. Perez became subject to civil proceedings to remove her children from her custody. The proceedings continued for over two years.

Petitioners' counsel argued that the petitioners had proffered justifiable excuses which would allow for a late filing of a Notice of Claim in that the petitioners were not only infants but are profoundly mentally and physically incapacitated; that these reasons were sufficient to toll the Statute of Limitations since the infant petitioners were not only of tender years but were profoundly injured, making them incapable of knowingly acting or refraining from acting to protect their legal rights; and, that the New York Supreme Court, Appellate Division, Second Department, had long held that infancy itself was a sufficient reason to excuse a late filing of a Notice of Claim, even where the infant was represented by counsel. Petitioners' counsel further argued that this case is even more compelling since the petitioners' mother was herself physically and mentally incapacitated from pursuing her children's legal rights. Thus, for an extended period of time, neither Ms. Perez nor her infant children were in any condition to pursue a legal claim against the respondents.

Petitioners' counsel also stressed that the respondents were aware of the incident and had been placed on notice of the underlying occurrence since both respondents had responded to the scene and had prepared written reports. The respondents were also certainly aware of the petitioners' claims just barely one year after the incident, when petitioners' former counsel brought a motion to serve the late Notice of Claim. The new evidence which petitioners' counsel annexed to his affirmation warranted a renewal and reconsideration of the

prior decision and justified the allowance of a late Notice of Claim.

Respondents submitted opposing papers to the motion. The Court denied Petitioners' motion in an Order dated September 2, 1993 and entered September 17, 1993. (App. 4a-5a)

A Notice of Appeal was filed on November 2, 1993 with the Appellate Division, Second Department, and the appeal was consolidated with the appeal from the October 18, 1991 Order. This matter was fully briefed by all parties by October 24, 1994, at which time it was submitted to the Appellate Division, Second Department. In their brief, the petitioners argued that the Supreme Court of Kings County had erred in failing to weigh all of the relevant factors set forth in the New York General Municipal Law ("GML") § 50-e in that the respondents had actual knowledge of the underlying facts at a time concurrent with, or shortly after, the incident; the respondents had not demonstrated any prejudice; the Supreme Court improperly relied upon the Statute of Limitations and failed to apply the applicable tolls; law office failure did not mandate denial of petitioners' application; and the petitioners had proffered a reasonable excuse for any delay. The petitioners also argued that they had demonstrated that their claim was meritorious.

In their reply brief, the petitioners further argued that the respondents essentially stood *in loco parentis* to the infant petitioners and that a Notice of Claim should not have even been necessary under GML § 50-e(8), or, even assuming that it was necessary, that the New York City social welfare authorities should have filed the Notice of Claim for the infants. It was further asserted that the respondents should have been estopped from objecting to the late filing since the respondents themselves had failed to provide the petitioners with copies of pertinent records and reports. The reply brief also requested that the Appellate Division not deny the petitioners' rights to due process and equal protection of the law

merely because their former counsel made a technical error in bringing the original motion. It was argued that the case was appealable since the motion was one to renew, not reargue.

On January 30, 1995, the Appellate Division, Second Department issued its Decision and Order in this matter. It affirmed the Order dated October 18, 1991, holding that the lower court did not err in denying the petitioners' application for leave to serve a late notice of claim and dismissed the appeal from the Order dated September 2, 1993 on the ground that the motion before the lower court, denominated as one to renew and reargue, was, in actuality, a motion to reargue, which is not appealable. (App. 1a-3a)

The petitioners moved for reargument or, alternatively, for leave to appeal to the Court of Appeals from the Appellate Division's January 30, 1995 Decision and Order. In their motion papers, the petitioners argued, *inter alia*, that the reargument to the Appellate Division should be granted since the court had overlooked the new evidence which was submitted on the motion to renew and reargue and had overlooked and misapprehended the factual and legal issues presented with respect to the petitioners' application for leave to file a late Notice of Claim. Alternatively, the petitioners requested leave to appeal to the Court of Appeals.

The Appellate Division, Second Department denied the motion in a Decision and Order dated April 10, 1995. (App. 9a-12a) Notice of Entry dated April 28, 1995 was served by mail upon the Respondents on April 28, 1995.

The petitioners then made a motion directly to the Court of Appeals of New York for leave to appeal on May 8, 1995. The petitioners essentially raised the same issues brought before the Appellate Division and asked the Court of Appeals to clarify and address issues which were in conflict among the Appellate Divisions and with state statutory law. The petitioners stressed that the courts have an equitable duty to protect these infant petitioners' interests. By Order dated

September 7, 1995, the Court of Appeals dismissed the petitioners' appeal from the Appellate Division's Order denying reargument and renewal upon the ground that that portion of the order did not finally determine the proceeding within the meaning of the Constitution. The petitioners' motion for leave to appeal was otherwise denied. (App. 13a-15a)

On October 23, 1995, the petitioners made a motion for reargument of the motion for leave to appeal to the Court of Appeals. The petitioners argued that the Court of Appeals improperly dismissed the petitioners' motion for leave to appeal upon the ground that the Appellate Division's order was not a final determination of the proceeding within the meaning of the Constitution, where the petitioners had shown, *inter alia*, that the Orders of the Appellate Division finally disposed of all of the issues of this action and the result of the Orders was that the petitioners would not be permitted to prosecute their claims against the respondents. The petitioners also argued that they had been wrongfully and finally deprived of their day in court, and their constitutional rights to due process and equal protection of the law. The Court of Appeals denied the motion to reargue by Order dated December 28, 1995. (App. 16a)

REASONS FOR GRANTING THE WRIT

The Fifth and Fourteenth Amendments to the Constitution guarantee that the petitioners will not be deprived of life, liberty, or property without due process of law and that no state shall abridge the petitioners' privileges and immunities, or deny the petitioners equal protection of the laws. The state courts of New York have misapplied the law, have applied the wrong law, and have usurped the power of the Legislature so as to deny the disabled, infant petitioners their lawful rights to a day in court, due process, and equal protection of the laws, as well as their civil rights under 42 U.S.C. § 1983, by refusing permission to file a late notice of claim where: *inter*

alia: (a) the mother of the disabled infants suffered a mental breakdown and hysterical blindness in the wake of the fire, (b) the City of New York Department of Social Services sought to take custody of the disabled infants and were acting *in loco parentis* to the children, but failed to file a timely notice of claim, (c) the mother, upon her recovery, retained counsel, who promptly made a motion to file a late notice of claim, (d) the original motion was denied without prejudice on the technicality that it should have been brought by order to show cause, (e) the court denied the motion when subsequently brought by order to show cause by presuming prejudice to the respondents, and (f) the Appellate Division, Second Department ignored New York state statutes, precedent of the Court of Appeals of New York and its own precedent without explanation. Supervision and review by this Court are requested.

I

This case presents the novel constitutional question of whether the state courts have violated the doctrine of the separation of powers, as well as the petitioners' rights to due process and equal protection of the law, in applying criteria which are more stringent than those required by statute and those utilized by the other Appellate Divisions and the New York Court of Appeals, in considering the petitioners' application to file a late Notice of Claim. The state courts in this case have applied rigid rules not found in the New York GML, rather than a flexible balancing of the equities. The result is an uneven and inequitable application of the law, wherein whether a petitioner's claim is allowed depends more upon where a petitioner lives, where an accident occurs and in which Appellate Division a claim is brought rather than the equities of the particular case. In this particular case, this approach violated the petitioners' rights to procedural due process and equal protection under the law, and the separation of powers doctrine.

The GML provides that a court, in its discretion, may extend the time to serve a Notice of Claim. GML § 50-e (5). In determining whether to grant an extension, a court is required to consider "all other relevant facts and circumstances," including whether the public corporation acquired actual knowledge of the essential facts constituting the claim within ninety days of the incident or within a reasonable time thereafter, whether the claimant was an infant or mentally or physically incapacitated and whether the delay in serving the notice "substantially prejudiced the public corporation in maintaining its defense on the merits." GML § 50-e. *See, also, Bloom v. Herrick Union Free School District*, 174 A.D.2d 665, 571 N.Y.S.2d 527 (2d Dept. 1991).

In considering the petitioners' late Notice of Claim, the state courts were clearly required to consider all relevant factors under GML § 50-e. *White v. New York City Housing Authority*, 203 A.D.2d 371, 610 N.Y.S.2d 90 (2d Dept. 1994). However, an examination of the record, facts and precedents pertinent to this case reveals that the state courts failed to properly carry out their statutory duty by failing to consider all of the relevant factors as required by GML § 50-e. This constituted an abuse of discretion as a matter of law and violated the separation of powers doctrine.

First, the state courts discounted the petitioners' infancy as an unacceptable excuse for the delay in filing the Notice of Claim despite the fact that the record overwhelmingly and compellingly demonstrated that this was a crucial factor in contributing to the delay in applying for leave to file a late Notice of Claim. The record before the Appellate Division showed that the infant Cassandra Diaz and her two siblings had no one to protect their interests in prosecuting their claim against the respondents and that they were incapable of safeguarding their own legal rights.

The petitioners also demonstrated that Angelina Perez, the children's mother and natural guardian, suffered from severe disabilities in the wake of the incident and was unable to pro-

tect the interests of the infant petitioners. Indeed, Angelina Perez' mental illness was so serious that the social welfare authorities instituted civil proceedings to remove her children from her custody.

Because the authorities essentially stood *in loco parentis* to the infant petitioners, a notice of claim should not have been necessary in this case. The state courts failed to address this statutory provision and its applicability (or lack thereof) to this case. This violated the separation of powers doctrine.

In light of the overwhelming evidence in the record establishing the petitioners' infancy, the inability of the petitioners to safeguard their own interests and the inability of their natural guardian (their mother) to protect their interests, the state courts erred as a matter of law in failing to find infancy as a legally acceptable excuse for the petitioners' delay.

Second, although the state courts were required to consider whether the claimant was mentally or physically incapacitated, it is evident that the state courts utterly failed to weigh such factor in this case given the overwhelming evidence of Cassandra Diaz's injuries.

The record demonstrates that all of the infant Petitioners suffered serious injuries in the fire. The most severe injuries were sustained by Cassandra Diaz, who remains in an irreversible coma in a persistent vegetative state. The state courts failed to show how this factor was not relevant to the determination of whether to permit Cassandra Diaz to file a late notice of claim.

In light of the overwhelming evidence in the record establishing the petitioners' (and their mother's) disability, the state courts erred as a matter of law in failing to find the petitioners' disability as a legally acceptable excuse for the petitioners' delay. Depriving the petitioners of their day in court constituted a denial of their right to due process of law.

Third, the state courts have recognized that an action brought under GML § 50-i is subject to the tolls for infancy and insanity provided in the New York Civ. Prac. L. & R. 208. *Cohen v. Pearl River Union Free School District*, 51 N.Y.2d 256, 258, 434 N.Y.S.2d 138, 414 N.E.2d 639 (1980); *Barnes v. County of Onondaga*, 65 N.Y.2d 664, 491 N.Y.S.2d 613, 481 N.E.2d 245 (1985). The Second Department has also recognized that a plaintiff's disability may toll the period for filing a notice of claim. *Morano v. County of Dutchess*, 160 A.D.2d 690, 691, 553 N.Y.S.2d 779 (2d Dept. 1990); *Savelli v. City of New York*, 104 A.D.2d 943, 480 N.Y.S.2d 561 (2d Dept. 1984). The failure of the Appellate Division, Second Department to apply its own precedent was akin to an application of an ex post facto law.

In addition, the period of the application's pendency should not have been considered as part of the period for commencing an action. *Giblin v. Nassau County Medical Center*, 61 N.Y.2d 67, 72, 471 N.Y.S.2d 563, 459 N.E.2d 856 (1984); *Mazzilli v. City of New York*, 115 A.D.2d 604, 605, 496 N.Y.S.2d 266 (2d Dept. 1985); *Ziecker v. Town of Orchard Park*, 70 A.D.2d 422, 421 N.Y.S.2d 447 (4th Dept. 1979), *aff'd*, 51 N.Y.2d 957, 435 N.Y.S.2d 720, 416 N.E.2d 1055 (1980).

Yet, the state courts failed to even consider the factor of the tolling of the statutory period in considering the Petitioners' application. Indeed, the trial court in its October 18, 1991 Order (App. 6a-8a) noted that "[t]he legislature has concluded that after three years *(absent tolling provisions)* this kind of action should be over." (Emphasis added) That court utterly failed to recognize that this case should not be viewed "absent tolling provisions."

Fourth, it is clear that the respondents had immediate notice of the incident, since they responded to the scene of the fire. They filled out the necessary reports and respondents have not denied that their employees were present at the scene.

NYCFD employees removed the infant Cassandra Diaz from her apartment and laid her atop a car roof with no attempts made at resuscitation for an extended period of time. At some point, respondent's employees apparently discovered that Cassandra was still alive, and resuscitation efforts were commenced. Unfortunately, by that time, it was too late. However, the respondents' employees were aware of Cassandra's critical condition, as demonstrated by their report. The reports specifically list the names of the infant Petitioners and provide specifics regarding how they were removed from the scene. Emergency medical services arrived on the scene and transported several members of the Perez family to the hospital for emergency medical treatment.

Presence at the scene by the respondents certainly constituted actual notice of the essential facts. *See, Swensen v. City of New York*, 126 A.D.2d 499, 511 N.Y.S.2d 20 (1st Dept. 1987), *app. den.*, 70 N.Y.2d 602, 518 N.Y.S.2d 1024 (1987); *De Groff v. Bethlehem Central School District*, 92 A.D.2d 702, 460 N.Y.S.2d 630 (3d Dept. 1983). The Appellate Division's decision in *Diaz* conflicted sharply with decisions of the other Appellate Divisions and constituted a violation of Petitioners' rights to equal protection under the law.

The records prepared by the respondents' employees, representatives or agents gave respondents actual knowledge of the facts constituting the claim. *Quiroz v. City of New York*, 154 A.D.2d 315, 546 N.Y.S.2d 604 (1st Dept. 1989); *Tomlinson v. New York City Health and Hospitals Corporation*, 190 A.D.2d 806, 593 N.Y.S.2d 565 (2d Dept. 1993); *Mendez v. City of New York*, 176 A.D.2d 311, 574 N.Y.S.2d 579 (2d Dept. 1991).[3]

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[3] Respondents should have been estopped from objecting to the Petitioners' filing of a late notice of claim since Respondents failed to provide Petitioners' counsel with copies of the emergency medical records, the "ambulance call report", and complete fire department records which are routinely prepared in situations of this sort and which are the evidentiary material upon which the claim is based. *See, e.g.*,

In addition, the Notice of Motion filed by the Petitioners on February 29, 1988 gave the respondents notice of the essential facts constituting Petitioners' claim and that this notice was given within a reasonable time after the occurrence.[4]

The state courts failed to find that the respondents had notice of the incident despite the overwhelming evidence in the record which showed such notice.

Fifth, the state courts erred in determining that the petitioners did not proffer a legally acceptable excuse for their extensive delay in moving for such relief. As discussed, *supra*, Cassandra Diaz's catastrophic disabilities, combined with the fact of her infancy, should have certainly led to the conclusion that her delay was reasonable.

In addition, the state courts failed to address the possible issue of law office failure which may be present in this case. "Law office failure . . . does not mandate denial of the application." *Soto v. New York City Housing Authority*, 180 A.D.2d 570, 580 N.Y.S.2d 272 (1st Dept. 1992). *See, also*, *Potter v. Board of Education of the City of New York*, 43 A.D.2d 248, 350 N.Y.S.2d 671 (1st Dept. 1974); *Hill v. County of Chemung*, 112 A.D.2d 653, 491 N.Y.S.2d 853 (3rd Dept. 1985).

Mazzilli v. City of New York, 115 A.D.2d 604, 496 N.Y.S.2d 266 (2d Dept. 1985); *Cassidy v. County of Nassau*, 84 A.D.2d 742, 443 N.Y.S.2d 742 (2d Dept. 1981).

[4] Respondents' failure to commence an investigation in the time period between the notice motion and the order to show cause should bar them from relying on that same time period to deny the Petitioners their day in court. Respondents should not be rewarded for not investigating and for not preparing a defense when they were aware of the full details of the claims and when they knew that the notice motion was denied *without* prejudice and that there was no deadline given for renewal of the improper motion. If there is any prejudice to the Respondents (which there is not), it is due to their own "self-induced" inaction or laches, not to any late notice by the Petitioners.

The Appellate Division, Second Department has itself held that even the lack of a reasonable excuse is not fatal to a petitioners' application. *Zybryski v. City of New York*, 147 A.D.2d 705, 538 N.Y.S.2d 315 (2d Dept. 1989), *mot. for lv. to app. dismissed*, 74 N.Y.2d 825, 546 N.Y.S.2d 338, 545 N.E.2d 628 (1989); *Fenton v. County of Dutchess*, 148 A.D.2d 573, 573-74, 539 N.Y.S.2d 42 (2d Dept. 1989), *lv. app. den.*, 74 N.Y.2d 608 (1989); *Patterson v. Town of Hempstead*, 104 A.D.2d 975, 976-77, 480 N.Y.S.2d 899 (2d Dept. 1984); *Rechenberger v. Nassau County Medical Center*, 112 A.D.2d 150, 152, 490 N.Y.S.2d 838 (2d Dept. 1985).

Sixth, although the respondents bore the burden of demonstrating that they were prejudiced by the delay, they failed utterly to carry that burden. The respondents' conclusory claims of prejudice were completely unsupported by the record. The state courts failed to apply the proper standard, which recognizes that conclusory claims of prejudice are "unpersuasive." *Farrell v. City of New York*, 191 A.D.2d 698, 595 N.Y.S.2d 531 (2d Dept. 1993). *See, also, Shabazz v. Sheltering Arms Childrens Service, Inc.*, ___ A.D.2d ___, 629 N.Y.S.2d 20 (1st Dept. 1995).

As demonstrated *supra*, prior to petitioners' case reaching the Appellate Division, there was no such thing as a presumption of prejudice without a hearing. However, prejudice was presumed for petitioners' case. A subsequent Appellate Division decision that addressed this issue did not presume prejudice. *See, e.g., Alvarenga v. Finlay*, ___ A.D.2d ___, 1996 N.Y.App.Div. LEXIS 2137 (2d Dept. 1996). Clearly, the petitioners have been wrongfully singled out by the state courts for disparate and unequal treatment. This cannot be squared with the constitutional requirements of due process and equal protection of the law.

The respondents failed to establish that they, through the proper exercise of discovery, could not have obtained complete information concerning the history, nature and extent of petitioners' injuries. *Welsh v. Berne-Knox-Westerlo Central*

School District, 103 A.D.2d 950, 951, 479 N.Y.S.2d 567 (3d Dept. 1984). *See, also, Consolo v. Sewanhaka Central School District*, N.Y.L.J., March 30, 1993, p. 25.

The Appellate Division also failed to hold a hearing to determine whether the respondents had been prejudiced despite precedent which had indicated that such hearing was appropriate. *Savelli v. City of New York, supra*. The failure to provide the petitioners with such hearing violated petitioners' rights to due process and equal protection under the law.

In sum, the petitioners were wrongfully denied their day in court, due process, and equal protection of the law where the record established that the petitioners were entitled to serve a late Notice of Claim. It is respectfully submitted that certiorari should be granted to review the important issues raised herein.

II.

The disabled, infant petitioners were wrongfully denied their day in court, due process, and equal protection of the law, under the federal and New York State Constitutions, because the state courts applied inappropriate, burdensome and unduly rigid standards to the case at bar, which standards contravened state statute and/or were inconsistent with those utilized in the other Appellate Divisions and the Court of Appeals of New York in determining whether to grant leave to file a late notice of claim and in whether to consider motions as ones for renewal.

The Appellate Division, Second Department has adopted a conservative method which appears to mechanically apply rigid rules which are not found in the language of the GML, while other Appellate Divisions have espoused a flexible analysis which focuses on a balancing of the equities and whether justice has been served. *See, e.g., Feliciano v. New York City Housing Authority*, 188 A.D.2d 296, 590 N.Y.S.2d

491 (1st Dept. 1992), *Rotoli v. Town of Gaines*, 184 A.D.2d 1085, 585 N.Y.S.2d 274 (4th Dept. 1992). This constituted a denial of equal protection in this particular case and a violation of the separation of powers doctrine.

The state courts, in *Diaz*, have clung to factors which are no longer relevant in light of the 1976 amendments to the GML, particularly the requirement that the petitioner show a nexus between the infancy and the delay. Although former GML § 50-e(5) required such nexus, the current GML contains no such requirement. In so doing, the Appellate Division, Second Department improperly usurped the legislative scheme. *See, also, Leiblein v. Clark*, 207 A.D.2d 348, 615 N.Y.S.2d 437 (2d Dept. 1994). In that case, the infant's claim was not allowed by the Appellate Division, as petitioner proffered no reasonable excuse for her delay: "While the absence of a nexus between the delay and the infancy will not automatically preclude the granting of leave to serve a late notice of claim . . . certainly 'the absence of a showing that the delay is a product of the infancy itself is a factor which militates against granting such relief.' (Citations omitted)" This language is disturbingly reminiscent of the language of the old statute. *See, also, Plantin v. New York City Housing Authority*, 203 A.D.2d 579, 611 N.Y.S.2d 28 (2d Dept. 1994); *D'Anjou v. New York City Health and Hospitals Corp.*, 196 A.D.2d 818, 601 N.Y.S.2d 944 (2d Dept. 1993); *Gandia v. New York City Housing Authority*, 173 A.D.2d 824, 571 N.Y.S.2d 52 (2d Dept. 1991).[5]

As discussed above, in amending the GML, it was the intent of the New York Legislature to broaden the availabil-

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[5] Other Appellate Divisions have embraced the more liberal spirit of the amendments to the GML. *See, e.g., Lannon v. Town of Henrietta*, 109 A.D.2d 1067, 488 N.Y.S.2d 327 (4th Dept. 1985); *Sinkler v. County of Monroe*, 127 A.D.2d 1006, 513 N.Y.S.2d 67 (4th Dept. 1987); *Arias v. New York City Housing Authority*, 178 A.D.2d 188, 577 N.Y.S.2d 47 (1st Dept. 1991); *Ferrer v. City of New York*, 172 A.D.2d 240, 567 N.Y.S.2d 734 (1st Dept. 1991).

ity of late notices of claim provided there was no undue prejudice to the defendant. The amended statute implicitly recognizes that a petitioner's infancy should be duly considered, as such an individual is incapable of protecting his or her own interests and legal rights.

In *Diaz v. City of New York* it is evident that the infant petitioners had no one to protect their rights in the wake of the devastating fire that changed their lives forever. By continuing to impose an onerous requirement that is not in the express provisions of GML § 50-e, it is respectfully submitted that the state courts in *Diaz* improperly encroached on and wrongfully usurped the function of the legislature. Such a burden is unfair, denies infant petitioners of equal protection of the law, and violates the separation of powers doctrine.

Finally, the state courts erred in denominating the petitioners' motion to the Appellate Division as one to renew. The denomination of the motion as one for reargument was clearly in error since the petitioners had presented new evidence which should have been considered by the lower court and the Appellate Division. The criteria used among the New York State courts have not been uniform and have not been applied consistently. This lack of uniformity and inconsistency in handling and reviewing renewal motions has led to inequitable results that vary with the lower court judge before whom a renewal motion is brought or with the particular Appellate Division or appellate panel that hears the appeal from such a motion. This inequity is an issue of great public importance because the procedural rules that are applied should be consistent throughout the state so that motions to renew are decided on their merits and are not randomly dismissed because of the particular court, appellate panel, or Appellate Division in which they happen to be brought. The failure to apply these standards in a consistent manner in this particular case violated the petitioners' constitutional rights to equal protection of the law.

Because this Court's intervention is necessary to correct the grievous violations of petitioners' constitutional rights by the state courts, certiorari should properly be granted.

III

The disabled, infant petitioners were wrongfully denied due process, and equal protection of the law, under the federal and New York State Constitutions, because the Court of Appeals of New York improperly dismissed petitioners' motion for leave to appeal upon the ground that "the order does not finally determine the proceeding within the meaning of the Constitution." It is clear that the state supreme court order being appealed was a final disposition of the case with prejudice.

The Court misapprehended the implications of the lower court's order when it dismissed the appeal on this ground. Section 5611 of the New York Civ. Prac. L. & R. provides that if an Appellate Division disposes of all the issues in an action its order shall be considered a final one. The orders of the Second Department were final, in that they disposed of all of the issues in the action. The result of these orders is that the petitioners will not be entitled to prosecute their claims against the respondents named herein.

Important considerations of the implication of the orders upon petitioners' constitutional rights add further strength to a determination of reviewability. The unduly strict interpretation of the GML in the case *sub judice* denied the petitioners equal protection of the law. The petitioners have also been denied their opportunity to establish the merits of their claims in a court of law. Because the state courts placed a greater burden on the infant petitioners to show a reason for their delay in serving their second application for leave to file a late notice of claim than is set forth under the express provisions of GML 50-(e), their refusal to grant the petitioners permission to serve a late Notice of Claim was unfair, con-

stituted a denial of equal protection of the law, and a violation of the separation of powers doctrine.

The petitioners should not be denied due process and equal protection of the law, as well as their civil rights, merely because their former counsel proceeded by notice of motion instead of order to show cause and then failed to correct their nonprejudicial, procedural error and because the state courts of New York have misapplied the law, have applied the wrong law, and have usurped the power of the Legislature. The state courts should not be allowed to eviscerate, without a hearing, the General Municipal Law, a statute which was enacted by a duly elected Legislature and which was relied upon by the petitioners and others similarly situated, as this constitutes unconstitutional retroactivity, in violation of the Due Process Clause as applied to the states through the Fourteenth Amendment to the federal Constitution. When human lives are at stake, procedural technicality should not be allowed to outweigh and overcome constitutional rights, equity, justice and compassion. It is respectfully requested that this Court grant certiorari to review these important issues.

CONCLUSION

For all of the foregoing reasons, the petitioners request the Court to grant this Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, and to accept this case for review.

Respectfully submitted,

ROBERT G. SPEVACK, ESQ.
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Susan R. Nudelman
Of Counsel

March 25, 1996

APPENDIX

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

93-08525
93-09190

Argued—December 15, 1994

SONDRA MILLER, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
FRED T. SANTUCCI, JJ.

In the Matter of CASSANDRA DIAZ, *et al.*,

Appellants,

—v—

City of New York, *et al.*,

Respondents.

Robert G. Spevack, New York, N.Y. (Susan R. Nudelman of counsel), for appellants.

Paul A. Crotty, Corporation Counsel, New York, N.Y. (Kristin M. Helmers of counsel; Jonathan T. Kweller on the brief), for respondents.

DECISION & ORDER

In a proceeding pursuant to General Municipal Law § 50-e for leave to serve a late notice of claim, the petitioners appeal from (1) an order of the Supreme Court, Kings County (Bernstein, J.), dated October 18, 1991, which denied their application for leave to serve a late notice of claim, and (2) an order of the same court, dated September 2, 1993, which denied their motion, denominated as one to renew and reargue, which was, in effect, for reargument.

ORDERED that the appeal from the order dated September 2, 1993, is dismissed; and it is further,

ORDERED that the order dated October 18, 1991, is affirmed; and it is further,

ORDERED that the respondents are awarded one bill of costs.

That branch of the petitioners' motion which was to renew was based upon facts that could have been raised at the time of the original motion, and the petitioners offered no excuse for their failure to present the evidence at that time. Therefore, the petitioners' motion, denominated as a motion to renew and reargue, was, in actuality, only a motion to reargue, the denial of which is not appealable (*see*, *Bartolo v South Nassau Communities Hosp.*, 198 AD2d 204).

A notice of claim against a municipality must be served within 90 days after the claim arises (General Municipal Law § 50-e[I][a]). However, a court, in its discretion, may grant a petitioner leave to serve a late notice of claim, "keeping in mind that it must strike an 'equitable balance * * * between a public corporation's reasonable need for prompt notification of claims against it and an injured party's interest in just compensation' " (*Matter of Reisse v County of Nassau*, 141 AD2d 649, 650, *quoting Camarella v East Irondequoit Cent. School Bd.*, 34 NY2d 139, 142-143]). In determining whether to grant leave to serve a late notice of claim, the court must consider "whether the public corporation * * * acquired actual knowledge of the essential facts constituting the claim within the

[90-day period] or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated * * * and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits" (General Municipal Law § 50-e[5]).

Here, the court did not err in denying the petitioners' application for leave to serve a late notice of claim. The petitioners did not proffer a legally acceptable excuse for their extensive delay in moving for such relief. Neither the petitioners' infancy, nor the alleged incompetency of their mother, explained the delay here, and the respondents did not have actual knowledge of the facts underlying the petitioners' claim within the 90-day period set forth in General Municipal Law § 50-e(1)(a) or within a reasonable time thereafter (*see, Kardashinsky v New York City Hous. Auth.*, 182 AD2d 676).

We have considered the petitioners' remaining contentions and find them to be without merit.

MILLER, J.P., LAWRENCE, RITTER and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

January 30, 1995

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

AARON D. BERNSTEIN, Justice

SEPTEMBER 2, 1993

INDEX 4847/88
OUR FILE H-1878
88XX006124

CASSANDRA DIAZ, JUAN R. PEREZ and ANTONIO DIAZ, by their Mother and Natural Guardian, ANGELINA PEREZ,

Petitioners,

—against—

THE CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORP.,

Respondents.

The petitioners move by notice of motion and affirmation of Robert G. Spevack, Esq., both dated June 1, 1993 for an Order granting renewal and reargument of the judge's prior order denying petitioner's to file a late Notice of Claim.

The respondents submit the affirmation of Yolanda Guadagnoli, Esq., dated August 31, 1993, in opposition.

The motion for reargument must be denied. There were no errors in considering the facts submitted in the prior motion. Secondly, the motion to renew does not explain why the additional facts, in the motion to renew, were not available.

Finally, on the merits, the application must be denied. It is now six and one-half years since the fire. Obviously, in such cases, employees and witness, retire, move or die. It is obvious that the petitioner received monumental injuries. The Court is sympathetic to their plight, but, unfortunately, the law prevents the granting of this motion.

ENTER

[ILLEGIBLE]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

AARON D. BERNSTEIN, Justice

October 18, 1991

INDEX 4847/88
OUR FILE M-1878
T #88XX006124

CASSANDRA DIAZ, JUAN R. PEREZ and ANTONIO DIAZ, by their Mother and Natural Guardian, ANGELINA PEREZ,

Petitioners,

—against—

THE CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

The petitioners move by Order to Show Cause dated September 26, 1991, affirmation of Robert G. Spevack, Esq., dated August 1, 1991 and affirmation of ANGELINA PEREZ sworn to the 8th day of August, 1991, for an Order granting petitioners leave to serve a late notice of claim.

The defendants submit the affirmation of Yolanda Guadagnoli, Esq., dated October 17, 1991, in opposition.

The petitioners CASSANDRA DIAZ and JUAN R. PEREZ allegedly suffered serious personal injuries. Cassandra's

injuries have left her in a permanently comatose condition. It is alleged that this injury resulted from the failure of the New York City Fire Department to attempt to resuscitate the infant after she was rescued from a fire that occurred on December 12, 1986.

The petitioner JUAN R. PEREZ was allegedly injured when the firemen accidentally dropped him while effecting a rescue causing him permanent injury.

The petitioners further claim that the respondent Emergency Medical Service failed to promptly respond and treat the petitioner CASSANDRA DIAZ, further contributing to her comatose condition.

It is claimed that the infant ANTONIO DIAZ suffered smoke poisoning. However, nowhere is it shown how the respondents are responsible for his injuries.

In February, 1988, these petitioners made a similar application by another attorney. The application was denied, without prejudice, because the petitioners failed to properly serve the papers.

Then, over three years later, this application is made.

This application must be denied. Firstly, the delay of three years has nothing to do with the injury to the petitioners. Counsel had been consulted and, presumably, concluded that there was no liability.

Secondly, a delay of five years must, of necessity, result in prejudice. Indeed, the statute of limitations for personal injury negligence actions, is three years. The legislature has concluded that after three years (absent tolling provisions) this kind of action should be over.

Lastly, there is no showing that the respondents had knowledge of any of the facts underlying this claim. All that the respondents knew was that there was a fire and the petitioner CASSANDRA DIAZ was given mouth-to-mouth resuscitation. Nowhere is there any showing that would alert the respondents to investigate any of the alleged acts which allegedly caused the injuries to petitioners.

Accordingly, the motion is denied in all respects.

ENTER

[ILLEGIBLE]
J. S. C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No. 4847/88

CASSANDRA DIAZ, JUAN R. PEREZ and ANTONIO DIAZ, by their Mother and Natural Guardian, ANGELINA PEREZ,

Petitioners-Appellants,

—against—

THE CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents-Respondents.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a decision and order duly made and entered in the within entitled action and filed in the office of the Clerk of the Appellate Division, Second Department on the 10th day of April, 1995.

Dated: New York, New York
April 28, 1995

ROBERT G. SPEVACK
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To: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

93-08525
93-09190

ALBERT M. ROSENBLATT, J.P.
SONDRA MILLER
DAVID S. RITTER
GLORIA GOLDSTEIN, JJ.

In the Matter of CASSANDRA DIAZ, *et al.*,

Appellants

—v—

CITY OF NEW YORK, *et al.*,

Respondents

DECISION & ORDER ON MOTION

Motion by the appellants for reargument of an appeal from two orders of the Supreme Court, Kings County, dated October 18, 1991, and September 2, 1993, respectively, which was determined by decision and order of this court dated January 30, 1995, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, with $100 costs.

ROSENBLATT, J.P., MILLER, RITTER AND GOLDSTEIN, JJ., concur.

ENTER:

Martin H. Browstein
Clerk

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh *day of* September 1995

PRESENT, HON. JUDITH S. KAYE, *Chief Judge, presiding.*

Mo. No. 679

In the Matter of CASSANDRA DIAZ, *et al.*,

Appellants,

—v.—

CITY OF NEW YORK, *et al.*,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order dismissing appellants' appeal from Supreme Court's order denying reargument and renewal, be and the same hereby is dismissed upon the ground that that portion of the order does not finally determine the proceeding within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ STUART M. COHEN
Stuart M. Cohen
Deputy Clerk of the Court

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

Mo. No. 679

In the Matter of CASSANDRA DIAZ, *et al.*,

Appellants,

—v.—

CITY OF NEW YORK, *et al.*,

Respondents.

DECISION September 7, 1995

Motion, insofar as it seeks leave to appeal from that portion of the Appellate Division order dismissing appellants' appeal from Supreme Court's order denying reargument and renewal, dismissed upon the ground that that portion of the order does not finally determine the proceeding within the meaning of the constitution; motion for leave to appeal otherwise denied with one hundred dollars costs and necessary reproduction disbursements.

STATE OF NEW YORK
COURT OF APPEALS

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

Mo. No. 1382

In the Matter of CASSANDRA DIAZ, *et al.*,

Appellants,

—v.—

CITY OF NEW YORK, *et al.*,

Respondents.

DECISION December 28, 1995

Motion for reargument of motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

By: Aaron D. Bernstein, Justice

DATE: April 11, 1988

INDEX NO. 4847/88
T# 88XX006124
OUR FILE M-1878

ANTONIO DIAZ, CASSANDRA DIAZ, JUAN A. PEREZ, NADEAN PEREZ, and ALISA PEREZ, infants, by thier mother and natural guardian, ANGELINA PEREZ, and ANGELINA PEREZ, individually,

Plaintiffs,

—against—

THE CITY OF NEW YORK and THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendants.

The petitioners move by notice of motion and affirmation of Stephen M. Chizmadia, Esq., both dated February 29, 1988, for an Order permitting the petitioners to serve late notices of claim *nunc pro tunc*.

The respondents oppose the motion by affirmation of Ruth J. Bednarz, Esq., dated April 1, 1988.

The respondents first claim that this proceeding was not properly commenced. This proceeding was brought by service

of the moving papers by ordinary mail. Respondents claim that the proceeding must be commenced by the personal service of the moving papers.

It is apparent from the caption that there is no action pending. Therefore this is a special proceeding. In a very erudite opinion, Judge Martin Evans in Application of Crespo, 123 Misc 2 862 478 NYS 2d 319, points out that this special proceeding must be served in accordance with Section CPLR 403 C, if it is, as it is in this case, brought on by notice of petition.

Accordingly, the motion is denied without prejudice to another application brought on by proper service.

ENTER

[ILLEGIBLE]
J. S. C.

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

No. 95-1558

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

CASSANDRA DIAZ, JUAN R. PEREZ AND ANTONIO DIAZ, BY THEIR MOTHER AND NATURAL GUARDIAN, ANGELINA PEREZ,

Petitioners,

- against -

THE CITY OF NEW YORK AND THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION

LEONARD J. KOERNER,*
STEPHEN J. McGRATH,
KRISTIN M. HELMERS,
of Counsel.

* Attorney of Record
May 24, 1996

PAUL A. CROTTY,
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COUNTER-QUESTIONS PRESENTED

1. Should this Court deny the writ on jurisdictional or prudential grounds, or both, where the alleged Constitutional and section 1983 claims were never properly presented to, and hence not passed upon, by the state courts?

2. Even if petitioners' failure to raise their claims below does not provide a jurisdictional impediment to review, should the writ be denied for lack of a substantial federal question, (a) where this Court has consistently upheld the authority of state legislatures to limit the right to sue by imposition of conditions precedent and statutes of limitations similar to the notice-of-claim provisions contained in New York State's General Municipal Law sections 50-e and 50-i; (b) where petitioners' alleged federal claims reduce to the proposition that state decisional law applying the notice-of-claim provisions is not uniform, but this Court has equally consistently held that, in guaranteeing equal protection and due process, the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error; and (c) where, in any event, there was no error or lack of uniformity here because, having concededly failed to file a notice of claim within the required time period, petitioners' quarrel is with the lower court's discretionary determination, after considering the applicable statutory criteria, not to permit late filing, and such a determination will by definition depend on an assessment of circumstances which vary from case to case?

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REASONS FOR DENYING THE WRIT

POINT ONE

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No. 95-1558

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

CASSANDRA DIAZ, JUAN R. PEREZ AND ANTONIO DIAZ, BY THEIR MOTHER AND NATURAL GUARDIAN, ANGELINA PEREZ,

Petitioners,

- against -

THE CITY OF NEW YORK AND THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION

JURISDICTION

Petitioners erroneously rely on 28 U.S.C. § 1254 to invoke this Court's jurisdiction. That provision applies solely to review of cases decided by federal courts of appeal, whereas 28 U.S.C. § 1257 governs writs of certiorari in state court matters. However, as discussed more fully in Point One, *infra,* the requirements of section 1257, and of Rules 10 and 14(1)(g)(i) of the Rules of this Court, as interpreted and applied in this Court's decisional law, have clearly not been met, and the writ should be denied for lack of jurisdiction without reaching the merits of the petition.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

On page 2 of their application, petitioners allege that this case involves the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. section 1983. Petitioners do not make reference to the state law provisions

whose application to the facts of this case allegedly violated their federal rights, to wit: New York General Municipal Law ("GML") section 50-e(1) which, in pertinent part, requires service of a notice of claim within 90 days after the claim arises in any tort case where a notice of claim is a condition precedent to suit; GML section 50-i(1), which makes a notice of claim a condition precedent in all personal injury actions prosecuted against a municipality, further providing that such actions must be commenced within one year and 90 days after the happening of the event on which the claim is based; and GML § 50-e(5), which provides that, in its discretion, the court may extend the original 90-day period for filing a notice of claim, as long as the extension does not exceed "the time limited for the commencement of an action" *(i.e.*, the one year and 90 days of GML § 50-i[1], unless subject to a statutory toll). GML § 50-e(5) also sets forth several factors to guide the

court in its discretionary determination of whether or not to grant such an extension. These state provisions are reproduced in full in the Appendix to this brief. Also reproduced are the 10-year tolling provisions of New York Civil Practice Law and Rules ("CPLR") section 208 relating to infancy and insanity, which, under New York law, extend the period during which a court is empowered to exercise its discretion to grant leave to file a late notice of claim, but which do not eliminate the threshold 90-day requirement.

STATEMENT OF THE CASE

A. Factual Background

On December 12, 1986, at approximately 2:00 a.m., a fire broke out at 106 Hull Street, Brooklyn, New York (65).[1] The fire then spread to 104 and 102 Hull Street,

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[1] Numbers in parentheses not preceded by a letter refer to pages in the Record on Appeal submitted to the New York Supreme Court, Appellate Division, Second Department. (continued...)

buildings that were adjoined to one another by a common wall (65). The infant petitioners and their mother, Angelina Perez, were residents of 102 Hull Street (20).

Because of the fire, the occupants of 102 Hull Street were assisted in exiting from the building by the New York City Fire Department (66). After removal from the building, the Fire Department contemporaneously prepared "structural report" records indicating, inter alia, that mouth-to-mouth resuscitation was performed on Cassandra Diaz by Fire Fighter Rotanz (66, 67). The occupants of 102 Hull Street who were injured as a result of the fire were then taken to the hospital to receive treatment for their injuries (68). Seventy-two hours after the incident everyone except petitioner Cassandra Diaz and her infant brother, petitioner

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[1] (...continued)
Parenthetical references preceded by the letters "PA" refer to pages in the appendix to the instant Petition for Certiorari; the letters "RA" indicate pages in the appendix to the respondents' Brief in Opposition.

Juan Perez, were listed in fair or satisfactory condition (68). Within three days after the incident, a third sibling, petitioner Antonio Diaz, was released from the hospital in satisfactory condition (68).

Although there is no mention in Fire Department records, or any other records, petitioners claim that, when being removed from the building, the infant Juan Perez "... was dropped at least once by a fireman, striking his head when he was dropped" (58). And even though, as noted above, documentation concerning resuscitation efforts appears in contemporary Fire Department records (67), petitioners also allege that at "no time did any member of the New York City Fire Department attempt to resuscitate ... Cassandra Diaz" (58).

B. Procedural History

In February of 1988, within the one year and 90-day period of GML § 50-e(5), petitioners brought on a motion

seeking permission to file a late notice of claim against the City of New York and the New York City Health and Hospitals Corporation (hereinafter "HHC")(7). In an order dated April 11, 1988, the Supreme Court, County of Kings, denied petitioners' motion, with leave to make another application on proper papers (PA 17a).

Inexplicably, that application was not made for another three and one-half years, when, on September 26, 1991, petitioners, having obtained new counsel, sought permission to file a late notice of claim (45). By order dated October 18, 1991, the Supreme Court denied petitioners' motion on the merits (PA 6a).

On June 1, 1993, almost two years after the second motion had been denied and six and one-half years after the incident, petitioners moved to renew and reargue the Supreme Court's denial of the motion. By order dated

September 2, 1993, the Supreme Court, County of Kings, denied the motion (PA 4a).

Petitioners sought review in the Appellate Division, Second Department, which, *inter alia,* affirmed the lower court's order denying leave to serve a late notice of claim on January 30, 1995 (PA 2a-3a). Petitioners thereupon sought reargument in the Appellate Division or, in the alternative, leave of the Appellate Division to appeal to New York State's highest court, the Court of Appeals. This motion was denied by order entered April 10, 1995 (PA 11a-12a).

As permitted by CPLR section 5602(a), petitioners then sought leave to appeal in the Court of Appeals itself. This motion was dismissed in part and denied in part by order dated September 7, 1995 (PA 13a-14a). Petitioners' subsequent motion to reargue was denied by order of the same Court dated December 28, 1995 (PA 16a).

OPINIONS BELOW

A. Opinions of the Lower Court

In considering petitioners' original 1988 motion, the Supreme Court, Kings County (Bernstein, J.), found it jurisdictionally defective, citing *Application of Crespo*, 123 Misc2d 862, 478 NYS2d 319 (Sup. Ct., N.Y.Co., 1984). In *Crespo*, the Court held, *inter alia,* that where, as here, a special proceeding is commenced to obtain permission to file a late notice of claim before a summons and complaint have been served, jurisdiction is not obtained merely by mail service of a "notice of motion." Accordingly, in the instant case, petitioners' motion was denied on that ground, but "without prejudice to another application brought on by proper service" (PA 18a).

Concerning the second application, made three and one-half years after issuance of the original order, the same Court ruled on the merits, finding that permission to file a

late notice of claim should be denied because (1) the delay in seeking leave had nothing to do with the injuries claimed by the petitioners; (2) there was no showing that the respondents had acquired knowledge of any of the facts underlying the claim; and (3) given that situation, "a delay of five years must, of necessity, result in prejudice" (PA 7a).[2]

Two years later, in denying petitioners' motion to renew or reargue, the Court found reargument inappropriate because "[t]here were no errors in considering the facts submitted in the prior motion" (PA 4a). As to renewal, the Court pointed out, *inter alia,* that petitioners had not

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[2] We draw the Court's attention to the fact that petitioners erroneously insist that the Supreme Court "retroactively rescinded its prior order granting leave to refile a late notice of claim application." Petition for Cert. at pp. ii and iii (emphasis added). The Record demonstrates no support for this proposition, which forms the linchpin for almost all of petitioners' claims. What the lower court did in its October 1991 order was to consider the application, i.e., accept the refiling, but then determine that it should be denied on the merits.

submitted, as normally required by New York practice, any explanation of why the "additional facts" contained in the renewal motion were not available when the original application had been made (PA 4a). On the merits, the Court stated that it was sympathetic to petitioners' plight, but that, given, inter alia, the passage of six and one-half years since the fire, it felt compelled to deny the motion (PA 5a).

B. Opinions of the Intermediate State Appellate Court

In its January 30, 1995 opinion, the Appellate Division dismissed petitioners' appeal from the Supreme Court's 1993 order denying renewal or reargument on the ground that, because petitioners' motion was "based upon facts that could have been raised at the time of the original motion, and the petitioners offered no excuse for their failure to present the evidence at that time," the motion was, in actuality, only one to reargue (PA 2a). Under New

York law, denial of a motion to reargue is not appealable (id.).

On the merits of the underlying appeal from the Supreme Court's 1991 order, the Appellate Division reviewed the notice-of-claim requirements, noting that, in considering whether to grant permission for late filing, a court is statutorily required to take into account all relevant factors -- including, specifically, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the statutory 90 days, or soon thereafter; whether the claimant was an infant, or mentally or physically incapacitated; and whether the delay would prejudice the public corporation in maintaining its defense on the merits (PA 2a-3a). Here, the Appellate Division found (1) that petitioners had not proffered a legally acceptable excuse for their delay, which was explained neither by the mother's alleged incompetency nor the

petitioners' infancy; and (2) that respondents did not have actual knowledge of the facts underlying the claim within the 90-day period of GML § 50-e(1)(a). Accordingly, the Appellate Division found that the lower court had not erred in denying petitioners' application to serve a late notice of claim (PA 3a).

The Appellate Division issued no opinion in connection with its subsequent April 10, 1995 order denying both reargument and leave to appeal.

C. Opinions of the New York State Court of Appeals in Denying Leave to Appeal

On the merits, the Court of Appeals denied leave to appeal from that part of the Appellate Division's order affirming the Supreme Court's October 18, 1991 order denying leave to file a late notice of claim, without elucidating its reasons for doing so. It dismissed that portion of the motion for leave which sought review of the Appellate Division's determination that the Supreme Court's

subsequent September 2, 1993 order was an unappealable denial of a motion to reargue, stating that the 1993 order did not "finally determine the proceeding within the meaning of the [state] Constitution" (PA 13a).[3]

REASONS FOR DENYING THE WRIT

POINT ONE

INASMUCH AS PETITIONERS' ALLEGED CONSTITUTIONAL AND SECTION 1983 CLAIMS WERE NEVER PROPERLY PRESENTED TO, AND HENCE NOT PASSED UPON, BY THE STATE COURTS, THE WRIT SHOULD BE DENIED ON JURISDICTIONAL OR PRUDENTIAL GROUNDS, OR BOTH.

It is black-letter law that this Court will not consider cases coming from the state courts unless the particular question for which review is sought was "either raised or

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[3] Under New York law, it is well-settled that "a determination made *subsequent* to a final determination is not itself a final determination for purposes of appeal to the Court of Appeals." Cohen and Karger, *Powers of the Court of Appeals*, § 10, p. 42 (Rev. Ed., 1992) (emphasis in original). Thus, the October 1991 order was final, but the September 1993 order patently was not.

squarely considered and resolved" in the state forum. *Illinois v. Gates*, 462 U.S. 213, 218, n.1 (1983). *Accord*, *Street v. New York*, 394 U.S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). This principle is embodied in Rule 14(1)(g)(i) of the Rules of this Court, which requires a petitioner seeking review by certiorari to specify, *inter alia*, "the stage in the proceedings ... when the federal questions sought to be reviewed were raised; ... [and] the way in which they were passed on [by the state courts]; ... so as to show that the federal question was *timely and properly raised* and that this Court has jurisdiction to review the judgment on a writ of certiorari" (emphasis added).

Whether the "not pressed or passed upon below" rule is considered jurisdictional or prudential, *see, Illinois v. Gates, supra,* 462 U.S. at 218-219, it clearly dictates

denial of the instant petition. As petitioners themselves describe the context in which they allegedly raised their federal claims (*see,* Pet. for Cert. at p. 4, note 1), the state courts could not, and hence did not, rule on them.

Petitioners concede that they never cast their claims in terms of denial of due process (including denial of access to the courts) and equal protection until submission of their October 24, 1994 reply brief to the Appellate Division. Pet. for Cert. at p. 4, note 1. This was patently untimely, because the Appellate Divisions of this State have uniformly announced that they will not consider new issues raised for the first time in a reply brief. *See, e.g., Crest Auto Leasing v. Green,* 211 AD2d 525, 622 NYS2d 441 (1st Dept., 1995); *State Farm Fire and Casualty Co. v. LiMauro*, 103 AD2d 514, 521-522, 481 NYS2d 90 (2nd Dept., 1984), *aff'd*, 65 NY2d 369, 492 NYS2d 534, 482 NE2d 13 (1985).

Nor is it of any moment that petitioners reiterated their alleged due process and equal protection claims in their initial motion in the Court of Appeals seeking review by that Court, as well as in their subsequent motion to reargue its denial. The New York State Court of Appeals has repeatedly stated that it will not consider constitutional issues raised for the first time in that court. *See, e.g., Matter of Barbara C.,* 64 NY2d 866, 487 NYS2d 549, 476 NE2d 994 (1985); *Melahn v. Hearn,* 60 NY2d 944, 471 NYS2d 47, 459 NE2d 156 (1983); *Eagle v. Paterson,* 57 NY2d 831, 455 NYS2d 759, 442 NE2d 56 (1982); *Barber v. Dembroski,* 54 NY2d 648, 442, NYS2d 768, 426 NE2d 175 (1981).

Furthermore, even if petitioners used the words "due process" and "equal protection" in their Appellate Division reply brief, and even if the Appellate Divisions of this State would consider it acceptable to raise new issues

for the first time in that context (which, as discussed above, they would not), respondents submit that passing references to these concepts, without developed analysis or argument, are insufficient to satisfy the "pressed or passed upon below" rule. In the context of the 28-page reply brief, for example, the "constitutional" claims reduce to one sentence on page 1 stating, in pertinent part, that "[t]he Petitioners in this action have been deprived of their day in court and have been denied their rights to due process and equal protection of the laws, as guaranteed by the federal and state constitutions, merely because their former counsel ... moved for leave to file a late notice of claim by way of notice motion [*sic*] instead of order to show cause." This statement is basically reiterated on page 6: "Cassandra and the other Petitioners are entitled to their day in Court. They should not be denied due process and equal protection of the law merely because their former counsel proceeded

by notice of motion instead of order to show cause and then failed to correct their nonprejudicial, procedural error." Not a case is cited in support of the proposition that proper application of validly imposed jurisdictional requirements, or conditions precedent to suit, or statutes of limitations, offends due process or must be subjected to an equal protection analysis. Under such circumstances, we submit that these issues were not just raised in an untimely manner, but not even properly raised at all. *Cf. Beck v. Washington,* 369 U.S. 541, 553 (1962).[4]

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[4] The "separation of powers" claim does not appear until even later, when petitioners moved to reargue in the Appellate Division (motion at ¶ 87), where it is simply asserted in passing in an equally conclusory manner – *i.e.*, without analysis. In addition, respondents have been unable to locate anywhere in the pleadings and briefs below a reference to a section 1983 claim.

POINT TWO

BECAUSE PETITIONERS' VAGUE ALLEGATIONS OF DUE PROCESS AND EQUAL PROTECTION VIOLATIONS ARE BASED ON THE PREMISE THAT A VALID STATE LAW HAS BEEN MISAPPLIED, THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW BY THIS COURT.

In setting forth certain of the "Considerations Governing Review on Certiorari" in Rule 10 of its Rules, this Court has cautioned that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law," The decisional law is even more explicit:

> We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions ... [or] immunity from judicial error ...." Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106 (1920).

Beck v. Washington, 369 U.S. 541, 554-555 (1962). "Were it otherwise," the Beck Court then observes, "every alleged misapplication of state law would constitute a federal constitutional question." Id. at 555. Misapplication of state law is precisely the premise upon which the instant petitioners are proceeding, and, in addition to the jurisdictional deficiencies, precisely the reason why the writ should be denied.

We note, first, that petitioners do not claim that the provisions of New York's General Municipal Law establishing a notice of claim requirement are themselves unconstitutional, as indeed they could not. This Court has observed that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary and irrational." Martinez v. California, 444 U.S. 277, 282

(1980). Cf. Sun Oil Co. v. Wartman, 486 U.S. 717, 730 (1988) (state's interest in determining when a claim is too stale to be adjudicated suffices to give it legislative jurisdiction to control available judicial remedies by imposing statutes of limitations); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitation "go to matters of remedy, not to destruction of fundamental rights").[5]

More specifically, New York's own appellate courts have upheld the validity of the notice of claim provisions in the face of due process and equal protection challenges under both the state and federal constitutions. See, e.g.,

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[5] As interpreted by the New York courts, the requirement that a notice of claim be filed within 90 days is a condition precedent to suit. Davidson v. Bronx Municipal Hospital, 64 NY2d 59, 61, 484 NYS2d 533, 473 NE2d 761 (1984). The provisions permitting a court, at its discretion, to grant leave to file a late notice of claim, as long as the extension does not exceed one year and 90 days (subject to any applicable statutory tolls), act as a statute of limitations. Cohen v. Pearl River Union Free School District, 51 NY2d 256, 434 NYS2d 138, 414 NE2d 639 (1980).

Matter of Brown v. Board of Trustees, 303 NY 484, 104 NE2d 866 (1952); MacMullen v. City of Middletown, 187 NY 37, 79 NE 863 (1907). Accord, Umansky v. N.Y. Met. Transit Authority, 111 AD2d 918, 491 NYS2d 33 (2nd Dept., 1985); Pausley v. Chalmoner, 54 AD2d 131, 388 NYS2d 35 (3rd Dept., 1976), app. dism'd, 41 NY2d 900, 388 NYS2d 35, 362 NE2d 641 (1975), app. denied, 41 NY2d 805, 395 NYS2d 1025, 363 NE2d 718 (1977); Guarrera v. A.L. Memorial Hosp., 51 AD2d 867, 380 NYS2d 161 (4th Dept., 1976), app. dism'd, 39 NY2d 942, 386 NYS2d 1029, 352 NE2d 897 (1976).

The lower federal courts which have considered the constitutionality of similar statutory requirements are in accord. See, e.g., Ornstein v. Regan, 604 F2d 212, 214 (2nd Cir., 1979) (noting, inter alia, that a statute of limitations is not unconstitutional even if it terminates an infant's right to make a claim before he reaches majority

and can exercise that right); Dinh v. Rust International Corp., 974 F2d 500, 502 (4th Cir., 1992) (no federal constitutional right to continued existence of common-law causes of action); Montegino v. Canale, 792 F2d 554, 558 (5th Cir., 1986) (in terms of procedural due process rights, access to the courts may be restricted with regard to a right which is not fundamental); Douglas v. Stallings, 870 F2d 1242 (7th Cir., 1989) (statute of limitations does not violate equal protection or, by restricting access to the courts, deny due process).

The existence of this unanimous body of case law simply emphasizes that petitioners' alleged federal claims reduce to the claim that the New York courts, under the individual circumstances of this case, misapplied an otherwise constitutionally valid state law. This fact is reinforced by the complete absence in the petition of any citation to federal cases supporting petitioners' position,

much less any attempt to show conflict between the decisions of the New York courts and those of this Court or other state courts of last resort. See, subsections (b) and (c) of this Court's Rule 10.[6]

Finally, respondents submit that the following elements of petitioners' argument lead irresistibly to the conclusion, if it has not been reached already, that their

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[6] Indeed, that this case involves only state law questions is further underscored by the fact that the only so-called "conflict" to which petitioners point allegedly emerges when the determination here is compared with other decisions of the Appellate Division, Second Department, or with decisions of the other Appellate Divisions and of New York State's highest court. If it exists, that is an issue for this state's court of last resort to resolve.

Furthermore, we note in passing that the lack of any genuine federal question can also be inferred from the fact that petitioners themselves did not attempt to take an appeal to the New York State Court of Appeals as of right, on the ground that a substantial constitutional question was directly involved, as permitted by CPLR § 5601(b)(1). Instead, they chose the alternate route of seeking discretionary review pursuant to CPLR § 5602(a) and (b), which is only appropriate when an appeal as of right on constitutional grounds is not available.

attempt to obtain a writ of certiorari from this Court borders on the frivolous:

(1) A "separation of powers" argument (Pet. for Cert. at, e.g., p. 13) based on the federal rather than the New York State Constitution is obviously untenable: Article I, section 8 of the former relates solely to allocation of powers among the branches of the federal government.

(2) Petitioners are attempting to obtain "federal question" review of a determination of the Appellate Division, Second Department, yet they devote an entire point in their brief to the proposition that the Court of Appeals erred in dismissing, as non-final under the New York State rather than the federal constitution, that portion of their motion seeking leave to appeal from the order upholding denial of the request for reargument or renewal (Pet. for Cert. at pp. 23-24) (see footnote 3, supra).

(3) Petitioners' assertion of lack of uniformity in state decisional law, while it emphasizes the non-federal nature of their claim, is premised on the assumption that absolute uniformity is possible in situations where courts are instructed, and given the discretion, to consider "all relevant circumstances," in addition to the statutorily-enumerated criteria (GML § 50-e[5]). Uniformity of this sort cannot, by definition, be achieved, since those circumstances vary from case to case; accordingly, the state appellate courts review such decisions for abuse of discretion. That no such abuse was found here does not create a question of federal law reviewable by this Court.

(4) Under New York law, while the one-year and 90-day period of GML § 50-e(5) in which a potential plaintiff may seek leave to file a late notice of claim is tolled by infancy or disability, this does not, as petitioners believe, compel the granting of the extension. See Cohen

v. Pearl River School District, supra, 51 NY2d at 265. If it did, the state court's legislatively-conferred ability to exercise its discretion would be eliminated. Here, the lower state court recognized the applicability of the toll by not simply dismissing petitioners' motion as untimely. See, Pierson v. City of New York, 56 NY2d 950, 453 NYS2d 615, 439 NE2d 331 (1982) (court is without authority to provide relief from failure to file a notice of claim once the applicable one-year and 90-day period has expired).[7]

(5) As affirmed by the Appellate Division, the trial court appropriately found that the infancy of certain of the petitioners did not cause the delay; that the mother's asserted psychological infirmity between 1986 and 1988 could not explain why no action was taken between 1988 and 1991, when petitioner's second motion was made; and that, while respondents clearly had knowledge from

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[7] This fact disposes of petitioners' contention that the state courts ignored the toll. Pet. for Cert. at p. ii.

contemporary records that the December 12, 1986 fire had occurred, those same records not only did not provide notice that the claims asserted by petitioners might exist, but flatly contradicted the validity of those very claims.

(6) The assertion that, because the City at one point sought, unsuccessfully, to obtain custody of the infants, the failure of the City itself to file a notice of claim created a conflict of interest and a constitutional violation is untenable. First, in seeking to protect the children, the City cannot be held responsible for not pressing a tort claim of which it had no independent knowledge. Secondly, the statute itself provides that where an infant is an adjudicated "ward" of the City, no notice of claim is required. GML § 50-e(8). Indeed, in their final state court papers seeking reargument of the Court of Appeals' denial of their motion for leave, petitioners argued that section 50-e(8) dispensed with the necessity of filing a notice of claim. Only in this

Court has the "conflict of interest" argument emerged as support for an alleged due-process violation.

In sum, where, as here, no substantial federal question is presented and the core issue involves the application of local law by the state courts, this Court should decline to undertake further review. Black v. Cutter Laboratories, 351 U.S. 292, 299-300 (1956).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX:

APPLICABLE STATE STATUTES

General Municipal Law § 50-e. Notice of Claim.

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

* * *

5. Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its

attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

General Municipal Law § 50-i. Presentation of Tort Claims; Commencement of Actions.

> No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers, that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the event upon which the claim is based; except that wrongful death

actions shall be commenced within two years after the happening of the death.

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

Civil Practice Law and Rules § 208. Infancy, Insanity.

If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond the years after the cause of action accrues, except, in any action

other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape.